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No. 92-1851

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ROBERT DAILEY; REGGIE LEACH, on behalf of themselves and all others similarly situated,
Petitioners,

v.

NATIONAL HOCKEY LEAGUE, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF OF NATIONAL HOCKEY LEAGUE PLAYERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

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INTEREST OF THE *AMICUS CURIAE*

The National Hockey League Players' Association ("NHLPA") is the exclusive collective bargaining representative for professional hockey players in the National Hockey League ("NHL"). The members of the NHLPA are employed by NHL member hockey clubs in both the United States and Canada. At the time this litigation was initiated and prior to expansion, the NHL was comprised of twenty one clubs, fourteen of which had their principal place of business in the United States. Although some NHLPA members are citizens or residents of other countries, most are Canadian citizens and residents or Canadian citizens resident in the United States or United States citizens and residents. The members of the plaintiff class in this action are either members or former members of the NHLPA.

Unlike more traditional labor organizations, the NHLPA does not engage in collective bargaining over the wages of specific members. Player salaries are individually negotiated. The NHLPA does, however, participate in collective bargaining over all other terms and conditions of employment. This includes employee benefit plans.

Employee benefit plans, including those at issue in this petition, are subject to the specific statutory mandates of the Employee Retirement Income Security Act of 1974 ("ERISA"). It is the preservation of those statutory rights conferred upon participants by ERISA that concerns the NHLPA as well as its present and former members. Equally significant, however, is that the statutory responsibilities and obligations, imposed by ERISA upon benefit plan fiduciaries, be maintained and enforced.[1]

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[1] The employee benefit plans covering NHLPA members are not excepted from the coverage of the Act by § 4(b)(4) which exempts only plans maintained outside of the United States primarily for the benefit

The petition for writ of certiorari explains the significance of the valuable rights created by ERISA -- rights which by statute may be enforced only in the United States district courts -- of which the plaintiff class has been deprived by the decision below. Apart from the fact that plaintiffs have erroneously been denied their day in court, the decision of the Court of appeals also serves to create misguided and unsound precedent with the potential for wide spread applicability. Other actions may arise affecting this and other benefit plans, and the important employee protections thought to have been provided by ERISA may turn out to have been illusory. Moreover, other professional sports operate in both the United States and Canada, and it is foreseeable that such employers, benefit plans or plan fiduciaries may require the assistance of the federal courts in preserving and enforcing federally protected rights and duties under ERISA. Obviously, the same is true of many other businesses.

With the consent of all parties, the NHLPA files this brief in support of a grant of the writ.[2]

ARGUMENT

In their petition for writ of certiorari, petitioners address how and why the decision of the Court of Appeals erroneously deprives the petitioners of the right to enforce an important statutory right enforceable exclusively in a United States district court. We confine ourselves in this brief to the proposition that the decision below is a gross misapplication of the doctrine of *Princess Lida of Thurn and*

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of persons, substantially all of whom are non-resident aliens.

[2] The written consents of all parties have been filed with the Clerk of the Court.

Taxis v. *Thompson*, 305 U.S. 456 (1939). It results in substantial injustice to the petitioners and, if followed by other courts, would have serious, undesirable effects elsewhere.

The *Princess Lida* doctrine has its roots in the same fundamental principles as a number of other doctrines enunciated by this Court -- including forum non conveniens, see *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235 (1981), and the abstention doctrines set forth in *Colorado River Water Conservation District* v. *U.S.*, 424 U.S. 800 (1976); *Younger* v. *Harris*, 401 U.S. 37 (1971) and *Burford* v. *Sun Oil Co.*, 319 U.S. 315 (1943) -- in that it advances the objectives of wise judicial administration and the appropriate conservation of judicial resources. It differs, however, in that its application is not discretionary but mandatory, although certainly not "mechanical," as the Court of Appeals stated. Where one court has taken control of a *res* and is actively involved in its disposition, a second court is said to lack subject matter jurisdiction of an action also seeking control and disposition of the *res*, thereby avoiding conflicting orders that the second court cannot enforce. The second action is dismissed not for prudential reasons but for lack of power. For this reason, this Court has emphasized that the doctrine must be applied carefully and narrowly so that important rights that present no such conflict, and are thus not beyond the power of the court, should not unfairly be lost.

We do not know, apart from the charm of its title, why the doctrine should have come to be known as the *Princess Lida* doctrine, because in that case this Court did no more than to follow its well-established earlier decisions, notably *Penn Co.* v. *Pennsylvania*, 294 U.S. 189 (1935); *United States* v. *Bank of New York & T. Co.*, 296 U.S. 463 (1936); and *Commonwealth Trust Co.* v. *Bradford*, 297 U.S. 613 (1936). These earlier decisions illuminate an important qualification to the doctrine stated in *Princess Lida* itself that should have

been controlling in the present action. It is inapplicable where:

> ". . . the plaintiff seeks merely an adjudication of his right or his interest as a basis of a claim against a fund in the possession of a state court, . . ." 305 U.S. at 466.

That reservation of jurisdiction should apply *a fortiori* where the basis for district court jurisdiction is not simply diversity of citizenship, as in *Princess Lida*, but rather a claim that rests upon a right created by a federal statute, in particular one whose enforcement is given exclusively to the United States district courts.

Penn Co. v. *Pennsylvania*, *supra*, explained more explicitly that the doctrine was to be applied narrowly and only to the extent necessary. There, this Court reversed a decision of the Supreme Court of Pennsylvania that had taken control of the *res*. Although the first action filed was in the United States District Court, the state court was plainly the one more appropriately suited to hear and determine the issues involved. The federal action had been brought by a creditor against an allegedly insolvent insurance company. It sought, among other things, the appointment of a receiver and "the usual injunction." The state court action, filed later, under a comprehensive statutory scheme for the orderly liquidation of insolvent insurance companies, sought an order directing the company to cease business and to place its assets in the hands of the State Insurance Commissioner for liquidation. The district court, however, had already issued an injunction restraining any interference with the property of the insolvent corporation.

This Court held that the state court was without jurisdiction over the assets of the company. It went on, however:

> "But even though the jurisdiction of the district court had attached, the state court was not without power to designate the Insurance Commissioner as the vehicle of the state authority to control the property whenever that could lawfully be done. While it is often said that of two courts having concurrent jurisdiction in rem, the one first taking possession acquires exclusive jurisdiction, see *Peck* v. *Jenness*, *supra*, 624, 625; *Wabash R. Co.* v. *Adelbert College*, *supra*, 54; *Harkin* v. *Brundage*, *supra*, 43, it is exclusive only so far as its exercise is necessary for the appropriate control and disposition of the property. The jurisdiction does not extend beyond the purpose for which it is allowed, to enable the court to exercise it appropriately and to avoid unseemly conflicts. See *Leadville Coal Co.* v. *McCreery*, *supra*, 477. The other court does not thereby lose its power to make orders which do not conflict with the authority of the court having jurisdiction over the control and disposition of the property." 294 U.S. at 198 (Emphasis supplied).[3]

The application of these principles to this case should have been relatively straightforward, since they provided an ample basis for the exercise of jurisdiction by the district court. Thus, even if it had been assumed that the Canadian court might someday take possession of the trust *res*, see p. 6 below, the application of the complete *Princess Lida*

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[3] To the same effect, *Commonwealth Trust Co.* v. *Bradford*, 297 U.S. 613, 619 (1936), also cited in *Princess Lida*, shows how narrow and limited the doctrine is. In that case this Court held that the district court had properly entertained and determined a claim although the assets from which its judgment had to be satisfied were in the possession of a trustee appointed by and subject to the direction of a state court.

doctrine -- rather than only a part of it -- required the district court in this action to retain and exercise its jurisdiction to the extent it could do so without coming into conflict with the Canadian court. "The virtually unflagging obligation of the federal courts is to exercise the jurisdiction given to them." *Colorado River Water Conservation District* v. *United States*, 424 U.S. 800, 817 (1976).

If the decision of the Ontario Court of Justice is upheld on appeal, there may not in fact be much left for the District Court in New Jersey to do. However, if the decision is reversed in whole or in part, it could well be that the ERISA claim for relief could lead to a larger money judgment than a judgment based upon Canadian employee benefit law.[4] There is no reason to suppose, if the United States judgment should be that the defendant Clubs are required to pay additional sums to the trustee, that the trustee, or the Canadian court in control of the trust, would refuse to take the money.[5] Moreover, the judgment of the United States court could well be that the Clubs must pay money directly to the plaintiffs. That would in no wise interfere with the Canadian court's control of the trust *res* and would plainly be within the jurisdiction of the district court under the holdings in *Princess Lida* and *Penn Co.*

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[4] The lengthy opinion of the Ontario Court of Justice does not even mention as a basis for relief the statutory rights created by ERISA, even though many members of the class in the Canadian action are United States citizens and residents that were formerly employed by United States corporations.

[5] As the Court of Appeals noted, the plaintiff classes in the two actions are not identical. The Canadian class includes players who were employed prior to 1983. The United States class includes players who were employed prior to 1988. Surely a decision by the United States district court, that players employed between 1983 and 1988 -- now deprived of any remedy -- are entitled to a judgment under ERISA, would be given effect by the Canadian court and trustee, though not otherwise available under Canadian law.

Finally, it should be noted that even if the Court of Appeals had not ignored the important qualification to the *Princess Lida* doctrine set forth above, its decision was in error because it was inaccurate to characterize these class actions as *quasi in rem* at all. To be sure, the complaints in both actions set forth multiple requests for relief, one of which is the removal of the current trustee and the assumption of control over the trust; but as is apparent from the exhaustive 189-page opinion on the merits by the Ontario Court of Justice, that was not the primary relief sought. *Bathgate* v. *The National Hockey League Pension Society, et al.*, 1992 Ont. C.J. LEXIS 1830. That opinion reflects a classic exercise of *in personam* jurisdiction. The court did not take control of any *res*. What the court did was to make a determination of the rights of the parties, applying the Canadian common law of employee benefit trusts. It found in favor of the plaintiff class and ordered an accounting. It held explicitly, near the end of its opinion:

> "The Applicants have asked for the removal of the trustee. Such an order is typically reserved for acts of dishonesty or where a court cannot be confident its directions will be followed. I do not feel the Respondents require this harsh remedial response." 1992 Ont. C.J. LEXIS 1830 at pp. 85-6.

The Court of Justice made declarations (findings) and orders which are reprinted in an appendix to this brief. It is evident that the most significant of its orders is No. 2, which directs the employer Clubs to pay money into the Trust so that it can be appropriately allocated. That is an exercise of *in personam* jurisdiction.

Examination of the complaint in the action at bar also shows that the primary relief sought is the payment of money damages by the defendant hockey Clubs. The complaint alleges violations of ERISA, breach of contract, and of fiduciary duty. To be sure, some of the prayers for relief duplicate or overlap those in the Canadian action. But there can be no doubt that plaintiffs would be satisfied to retain and litigate only their *in personam* claim for monetary damages. Thus, the appropriate principle that should have been followed was that ". . . where the judgment sought is strictly *in personam*, both the state [here, Canadian] court and the federal court, having concurrent jurisdiction, may proceed with the litigation at least until judgment is obtained in one of them which may be set up as *res judicata* in the other." *Princess Lida* v. *Thompson*, 305 U.S. at 466.

CONCLUSION

Although this action was filed two years ago, it will still be, if reinstated, in the earliest stage. Issue has not yet been joined. The district court, in denying the motion to dismiss the complaint, stated that it would move slowly, awaiting the outcome of the Canadian proceeding before deciding whether further action was appropriate. It emphasized that it would give due regard to the avoidance of conflict with the orders of the Canadian court. This was precisely the way in which the *Princess Lida* doctrine of this Court should have been applied.

The decision below has the potential for doing mischief in the rapidly expanding field of pension litigation. Yet it represents so plain a misreading of the decisions of this Court that it hardly requires extended deliberation. We

suggest that the appropriate disposition would be a grant of the writ of certiorari and summary reversal.

Respectfully submitted,

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APPENDIX

APPENDIX

Declarations and Orders of the Ontario Court of Justice in *Bathgate* v. *The National Hockey League Pension Society, et al.*, October 21, 1991

It is declared that:

(a) All excess Plan funds arising from experience rate credits relating to contributions made up to and including June 30, 1982 are to be allocated exclusively among the applicable participants to purchase for them additional pension benefits;

(b) the Pension Society was not authorized to allocate or pay any excess funds to the clubs or to use excess funds to finance obligations of the clubs to the Pension Society where those funds arose from experience rate credits relating to on [sic] contributions made up to and including June 30, 1982;

(c) the Pension Society was, and is, required to allocate all excess funds arising from experience rate credits even-handedly among beneficiaries and could not allocate such funds which arose from contributions made before June 30, 1982 to persons who were not trust beneficiaries at that time;

(d) all amendments to the Plan and trust documents permitting allocation of excess funds contrary to the foregoing declarations are invalid.

It is ordered that:

(1) In accordance with paragraph (5), an accounting be made of all excess funds arising from experience rate credits which have not been allocated exclusively to the participants;

(2) in accordance with paragraph (5) the clubs jointly and severally forthwith reimburse the Pension Society for all excess funds arising from experience rate credits paid to them or to others on their behalf by the Pension Society contrary to the foregoing declarations or used by the Pension Society to make pension plan contributions on their behalf contrary to these declarations, together with interest thereon, to be credited to the participants exclusively for the purposes of purchasing additional pension benefits;

(3) in accordance with paragraph (5), the Pension Society forthwith allocate to the participants for the purchase of additional pension benefits such funds still held by the Society which ought to have been previously allocated to the participants in accordance with the foregoing declarations;

(4) the Pension Society, forthwith upon receipt, allocate to the participants for the purchase of additional pension benefits those funds to be reimbursed by the clubs pursuant to paragraph (2);

(5) there be a reference forthwith to a master or a person agreed to by the Applicants and Respondents to determine the actual amount of excess funds, assets and earnings thereon together with interest arising from experience rate credits relating to contributions made up to and including June 30, 1982 and the manner and timing of distribution of such funds in the

form of purchases of additional benefits in favor of participants or their beneficiaries under the Plan and in what amounts to such persons in accordance with paragraphs (1), (2), (3) and (4);

(6) the Applicants will have pre-judgment and post-judgment interest against the clubs jointly and severally, calculated at the rate of investment return by plan assets or the rate of interest pursuant to the Courts of Justice Act, whichever is greater, which monies are to be allocated to the participants in accordance with the applicable preceding paragraphs; and

(7) the Applicants shall have their costs on a solicitor and client basis payable jointly and severally by the clubs.

The remainder of the Applicants' costs shall be payable by the Society out of the funds which are subject to this application in order that they be fully indemnified for the costs incurred in pursuing this matter.